IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED:15-12-2006

CORAM

THE HONOURABLE MR.JUSTICE S.ASHOK KUMAR

C.R.P.PD.No.776 of 2006

V.K.Bhuvaneswari ... Petitioner/Respondent

Versus

N.Venugopal. ... Respondent/petitioner

Civil Revision Petition filed under Article 227 of the Constitution of India against the fair and decreetal orders Dt. 23.2.2006 made in I.A.No.17 of 2003 in H.M.O.P.No.27 of 2002 on the file of the Sub Court, Cheyyar, Tiruvannamalai Dt.

For Petitioner : Mr.M.Sathyanarayanan
For Respondent : Mrs.Hemalatha

ORDER

Aggrieved over the fair and decreetal orders made in I.A.No.17 of 2003 in H.M.O.P.No.27 of 2002 on the file of the Sub Court, Cheyyar, Tiruvannamalai, this civil revision petition is filed.

2.Brief facts of the case are as follows:

The revision petitioner is the wife and the respondent is her husband. The respondent has filed H.M.O.P.No.27 of 2002 on the file of the Sub Court, Cheyyar, Tiruvannamalai for divorce on the ground of desertion under Section 13 of the Hindu Marriage Act. He has also filed an application in I.A. No. 17 of 2003 to subject the petitioner, respondent and the child for D.N.A. test to prove that the respondent was not the father of the child.

3.After contest, the application filed by the respondent has been allowed.

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4.Aggrieved over the said order, the present civil revision petition is filed.

5.Mr.M.Sathyanarayanan, the learned counsel appearing for the revision petitioner would contend that during the subsistence of marriage and within 270 days after the dissolution of marriage as per Section 112 of the Indian Evidence Act, any person born, shall be conclusive proof that he is the legitimate son of that man.

6.Per contra, Mrs.Hemalatha, the learned counsel appearing for the respondent would contend that the marriage was not even consummated and the wife did not allow her husband to touch her and therefore, conclusive proof under Section 112 of Indian Evidence Act is not applicable.

7.As far as this case is concerned, in the divorce petition filed by the respondent, he has categorically stated that the marriage was not consummated and that the petitioner has not allowed him to touch her, but she became pregnant and a child was born.

8.Therefore, to assert as to whether the child was born to him or not, the respondent has filed the said petition to subject them for D.N.A. Test and the application was ordered. For the purpose of the test, he has also deposited a sum of Rs.10,000/- before court.

9.The learned counsel appearing for the revision petitioner has pressed into service a judgement reported in 2005-1-L.W.713 (Bommi and another vs. Munirathinam), wherein this court has held as follows:

> "When the paternity of the child is challenged, there is nothing wrong in ordering the minor to undergo DNA test or to give blood, for analysis.
>
> Mere giving blood for analysis certainly will not amount to torture, as contended by the learned counsel for the revision petitioners--A fourteen years old girl cannot be described as incapacitated.
>
> Genetic structure which may be discovered with the DNA molecule in the cells of each individual, is unique and different in every individual —This new accurate technology should be made available to the court, in order to determine paternity or maternity disputes.

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Court has power to direct second plaintiff to undergo a DNA test, in order to ascertain the fatherhood of the second plaintiff, which would unfold the truth also."

10.A judgement reported in MANU/TN/3002/2006 (M.Dinesh Kumar vs. The Tamilnadu Dr.Ambedkar Government Law University, Chennai.) has also been pressed into service, wherein this Court has held as follows:

"4.In 2003(2) CTC 760 (Sharada v. Dharmpal), the Hon'ble Supreme Court case held, that no right to privacy is specially conferred under Article 21 of the Constitution of India and personal liberty under Article 21 cannot be held as an absolute right. Their Lordships have further held as follows:

71.The matter may be considered from another angle. In all such matrimonial cases, where divorce is sought, say on the ground of impotency, schizophrenia etc., normally without there being medical examination, it would be difficult to arrive at a conclusion as to whether the allegation made by his spouse against the other spouse seeking divorce on such a ground, is correct or not. In order to substantiate such allegation, the petitioner would always insist on medical examination. If respondent avoids such medical examination on the ground that it violates his/her right to privacy or for a matter right to personal liberty as enshrined under Article 21 of the Constitution of India, then it may in most of such cases become impossible to arrive at a conclusion. It may the very grounds on which divorce is permissible nugatory. Therefore, when there is no right to privacy specially conferred by Article 21 of the Constitution of India and with the extensive interpretation of the phrase "personal liberty" this right has been read into Article 21. It cannot be treated as absolute right. What is emphasised is that some limitations on this right have to be imposed and particularly where two competing interests clash. In matters of aforesaid nature where the legislature has conferred a right upon his spouse to seek divorce on such grounds, it would be the right of that spouse which comes in conflict with the so called right to privacy of the respondent. Thus, the court has to reconcile these competing interests by balancing the interests involved.

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75.So viewed, the implicit power of a Court to direct medical examination of a party to a matrimonial litigation in a case of this nature cannot be held to be violative of one's right of privacy.

To sum up, our conclusions are:

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1.A Matrimonial Court has the power to order a person to undergo medical test.

2.Passing of such an order by the Court would not be in violation of the fight to personal liberty under Article 21 of the Indian Constitution.

3.However, the Court should exercise such a power if the Applicant has a strong prima facie case and there is sufficient material before the Court. If despite the order of the Court, the Respondent refuses to submit himself to medical examination, the court will be entitled to draw an adverse inference against him.

5.There is a common saying that maternity is certainty and paternity is disputable, learned counsel for the petitioner submits that the mother knows who is the father of her child. Therefore, she is bound by the pleadings in O.S.No.34 of 1996 filed by her before the Family Court at Pudhucherry. Only in those cases where the lady has not shared the bed with any other person, except her husband, can certainly say who is the father of the child. A woman who had intimacy with another person or other persons during the subsistence of her marriage with her husband cannot say with certainty who is the father of the child. In this case, the Second Respondent married the petitioner in the year 1966 and the plaintiff first respondent was born in the year 1967. After desertion by the Revision Petitioner, it is alleged that she married one Durairaj in the year 1970. Therefore, the probability of the Revision Petitioner being the father of the First Respondent cannot be denied.

6.The birth extract shows the names of the father as Pandian and mother as Chandra. The Revision Petitioner wants to take advantage of the fact that his full name is not mentioned in the birth certificate. That is why the blood test has been ordered by the Trial court. The birth certificate and oral testimony may lie, but a scientific test like DNA and RNA would bring a conclusive proof with regard to the paternity and maternity of the child."

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11.Passing an order directing the petitioner to undergo D.N.A. test is not an intervention in the personal liberty of the said person, as held by the Honourable Supreme Court of India in the matter of Sharda vs. Dharmpal, as referred to above. The Honourable Supreme Court has also held that without there being medical examination, it is difficult to come to the conclusion that seeking divorce by the spouse against the other spouse is correct or not.

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12.In the above circumstances, I do not find any reasons to interfere with the order of the learned Subordinate Judge, Cheyyar, Tiruvannamalai.

13.In the result, this civil revision petition is dismissed. No costs. Consequently the connected C.M.P.No.7423 of 2006 and V.C.M.P.No.368 of 2006 are closed.

vk

Sd/-
Asst. Registrar.

/true copy/

Sub Asst. Registrar

To:

The Sub-Jduge, Cheyyar,
Tiruvannamalai Dt.,

+1 cc Mr.M.Sathyanarayanan Advocate Sr.62611
+1 cc Ms.S.Hamalatha, Advocate Sr.63192.

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